No. 01-682

Supreme Court, U.S.
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In The

Supreme Court of the United States

KAY BARNES, IN HER OFFICIAL CAPACITY AS MEMBER OF THE BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI, ET AL.,

Petitioners,

v.

JEFFREY GORMAN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE *AMICI CURIAE* STATES OF HAWAII, WASHINGTON D.C., FLORIDA, INDIANA, MAINE, MARYLAND, NEBRASKA, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, UTAH AND WYOMING IN SUPPORT OF PETITIONER, BOARD OF POLICE COMMISSIONERS OF KANSAS CITY, MISSOURI

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INTEREST OF THE *AMICI CURIAE*

The Amici States are strongly interested in whether municipalities may be subjected to punitive damages awards in private actions brought under section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794 (West 1999) ("Section 504"), and section 202 of the Americans with Disabilities Act, 42 U.S.C.A. § 12132 (West 1995) ("Title II"). The States' own exposure to punitive damage awards under those provisions may be affected by the Court's decision in this case. Although this Court held in *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate the States' sovereign immunity from private actions brought to enforce Title I of the ADA, several courts of appeal have held that Title II of the ADA did validly abrogate that immunity. *See, e.g., Hason v. Medical Bd.*, No. 00-55784, 2002 WL 206414 (9th Cir. Feb. 12, 2002); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*) (Congress validly abrogated the States' sovereign immunity with respect to Title II claims that assert denials of due process). Moreover, several courts of appeal have ruled that States accepting federal funds waived their immunity to actions brought under Section 504 of the Rehabilitation Act. *See, e.g., Douglas v. Cal. Dept. of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001); *Jim C. v. Ark. Dept. of Educ.*, 235 F.3d 1079 (8th Cir. 2000) (*en banc*), *cert. denied*, 121 S.Ct. 2591 (2001). Unless and until those lower court decisions are overturned, the States have a direct interest in ensuring that government's

traditional immunity from punitive damages is respected in this particular context.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eighth Circuit misapplied the general rule set forth in *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), that " 'absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.' " Pet. App. 9a (257 F.3d 738, 745-46) (quoting *Franklin*, 503 U.S. at 70-71). The court ignored well-established case precedent and congressional intent when it applied this broad remedies rule to the narrow question of whether punitive damages may be awarded against a municipality under Section 504 and Title II.

Units of government, both State and municipal, are afforded common law immunity from private, statutorily-created causes of action. There is, therefore, a strong presumption that punitive damages will not be awarded against them. *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 785 (2000); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 263 (1981). This presumption exists partly because the intent of punitive damages is to punish the wrongdoer and deter him or her from similar future acts. Yet as applied to government units, there is no deterrence. A punitive damages award punishes the blameless taxpayer rather than the individual officer who committed the wrong and drains government treasuries.

Consequently, absent a clear statement by Congress abrogating States' and municipalities' common law immunity, the presumption is that those governments retain their immunity from punitive awards. The Eighth Circuit erred in failing to recognize this strong presumption.

Furthermore, Congress did not intend to abrogate government's traditional immunity from punitive damage awards when it enacted Section 504 and Title II. Neither Section 504's nor Title II's plain language mentions anything about punitive damages. Though Section 504's remedies provision provides that the "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance" under Section 504, 29 U.S.C.A. § 794a(a)(2) (West 1999), Congress did not specify any monetary remedies under Title VI. This Court subsequently implied a cause of action and remedies for intentional violations of Title VI. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 597 (1983). The ADA's remedies provision similarly relies on Title VI, and is silent as to punitive awards. 42 U.S.C.A. § 12133 (West 1995).

This silence is telling because it shows that Congress intentionally omitted punitive awards under those provisions. In 1991, Congress enacted the Civil Rights Act of 1991, which provided a limited recovery of punitive damages against private employers – but not against units of government – under Section 501 of the Rehabilitation Act and Title I of the ADA, 42 U.S.C. § 1981a (1994), but not under Section 504 or Title II. The specific provision for punitive damages in only Section 501 and Title I shows

that Congress intended to omit any reference to punitive damages under Section 504 and Title II. *Duncan v. Walker*, 121 S.Ct. 2120, 2125 (2001). Additionally, by excluding units of government, Congress clearly intended to preclude state and municipal liability for punitive damages.

Equally significant is that when Congress enacted Section 504, the majority of courts had held that punitive damages were not available against *any* Section 504 defendant, let alone a unit of government. In order to rebut the presumption that Congress intended the *status quo* of no punitive damages to continue, there must be a specific statement by Congress to the contrary. *Newport*, 453 U.S. at 263. However, the only express provision by Congress for a sanction against a unit of government is an administrative sanction – the withdrawal of federal funding. This express provision does nothing to rebut the presumption that States and municipalities maintained their traditional common law immunity from punitive awards. In fact, it bolsters the position that Congress did not intend to abrogate that immunity.

Despite well-established case law, traditional presumptions afforded units of government, standard rules of statutory construction, and compelling public policy, the Eighth Circuit held that the general rule set forth in *Franklin* allowed a jury to award punitive damages against a municipality. This was error.

ARGUMENT

I. The Immunity From Punitive Damages That Governmental Entities Enjoyed At Common Law Applies to Statutorily-Created Causes Of Action Absent A Clear Congressional Intent To Abrogate That Immunity.

As this Court's decisions make clear, the immunity from punitive damages that units of government enjoyed at common law applies to statutorily-created causes of action unless Congress clearly abrogates that immunity. *See Vt. Agency of Natural Res.*, 529 U.S. at 784-85; *Newport*, 433 U.S. at 271. The Eighth Circuit overlooked this rule when it held that a local unit of government could be held liable for punitive damages under Section 504 and Title II. Neither of these provisions reflects a congressional intent to abandon the traditional governmental immunity from punitive damages. The Eighth Circuit's decision should therefore be reversed.

In *Newport*, the Court held that punitive damages were not available in actions brought against municipalities under 42 U.S.C. section 1983. 453 U.S. at 271. The Court reasoned that when Congress enacted Section 1983, it was presumably aware of common law defenses to tort claims and intended to preserve those defenses absent evidence to the contrary. *Id.* at 258. One such defense, the Court noted, was that municipalities were traditionally immune from punitive damage awards. *Id.* at 259-60. Finding no evidence in Section 1983's language, purpose, and legislative history that Congress intended to abolish that immunity, the Court in *Newport* concluded that municipalities enjoyed immunity from punitive damage awards in Section 1983 actions. *Id.* at 258-71.

In so ruling, the *Newport* Court stressed that both logic and weighty public policy considerations supported governmental immunity from punitive awards:

> Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. *A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the government entity itself.*

Id. at 267 (citations omitted) (emphasis added).[1] Awarding punitive damages against a government entity punishes "blameless or unknowing taxpayers" while providing a windfall to a fully compensated plaintiff. *Id.* at 267. "The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-71.

The foregoing considerations apply as equally to state governments as they do to municipalities. As with municipalities, punitive damage awards misallocate

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[1] *See also Lancaster Comm. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991) (government entities are incapable of forming malicious intent, and under RICO, damages amounting to punitive awards should not be imposed because it is the "body politic" that suffers); *Pine Ridge Recycling v. Butts County*, 855 F. Supp. 1264 (M.D. Ga. 1994) (similarly holding).

scarce resources from state programs that are likely underfunded to plaintiffs who have already received full compensation. Not surprisingly, then, this Court in *Vermont Agency of Natural Resources* relied upon the governmental immunity from punitive damages as a basis for concluding that States could not be held liable for punitive awards under the punitive False Claims Act ("FCA"). 529 U.S. at 784-85. The Court noted that "in *Newport* . . . we were concerned with imposing punitive damages on taxpayers under *any circumstances*. [Punitive damages], being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women[.]" *Id.* at 786 n.15 (internal quotations marks and citation omitted).

Nothing in *Franklin v. Gwinnett County Public Schools* suggests that this presumptive immunity from punitive damages does not apply when units of government are sued under statutes other than Section 1983 and the FCA. 503 U.S. 60 (1992). The *Franklin* Court was concerned with whether damages awards may, *in general*, be awarded under Title IX. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Consequently, the Court "made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie[.]" *Id.*

Franklin merely stands for the principle that, where Congress has not specified the remedies available for violations of particular statutory rights, the federal courts have inherent authority to fashion "appropriate relief" to redress those violations. 503 U.S. at 66-71. The "appropriate relief" principle derived from such cases as *Carey v. Piphus*, in which the Court recognized that "[t]he cardinal principle of damages in Anglo-American law is that of

compensation for the injury caused to plaintiff by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (emphasis in original) (internal quotation marks and citation omitted); *see also Franklin*, 503 U.S. at 69 (quoting *Carey*). As in *Franklin*, the Court therefore implied an award of compensatory, though not punitive, damages. Nothing in the Court's general application of the "all appropriate relief" principle in *Carey* or *Franklin* undercuts the *Newport* or *Vermont Agency of Natural Resources* Court's more specific holdings that punitive damages are not available in Section 1983 or FCA actions directed against local or state governments.

In sum, *Newport* and *Vermont Agency of Natural Resources* teach that punitive damage awards against state and local governments are presumptively foreclosed in actions to enforce statutory rights. Congress may reject this traditional limitation if it so chooses, but its intent to do so must clearly emerge from the statute's language, underlying purpose, and legislative history. As the next section shows, Congress has not manifested such an intent in either Section 504 or Title II.

II. Congress Did Not Intend To Abrogate Governmental Entities' Traditional Immunity From Punitive Damage Awards When It Enacted Section 504 and Title II.

Where the meaning of a statute is at issue, the search for congressional intent always begins with the statute's text and structure. *Alexander v. Sandoval*, 532 U.S. 275, 288 & n.7 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). "In ascertaining the plain meaning of the

statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). An examination of Section 504's and Title II's text and structure, construed in light of the Rehabilitation Act and the ADA as a whole, shows that Congress did not intend to expose units of government to punitive damage awards through these statutes.

1. Neither Section 504's nor Title II's plain language mentions anything about punitive damages. Instead, both statutes merely incorporate the remedies that Congress created for Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C.A. § 12133 (Title II); 29 U.S.C.A. § 794a(a)(2) (Section 504); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 & n.4 (1999); *see also Doe v. County of Centre*, 242 F.3d 437, 457 (3d Cir. 2001) ("On their face . . . neither Title II nor Section 504 indicate a congressional intent to override municipal immunity to punitive damages."). Title VI, moreover, is entirely silent on the matter of punitive damages. *See Doe*, 242 F.3d at 457.

In the face of this congressional silence, it would seem obvious that Section 504 and Title II lack the clarity this Court demands before concluding that Congress meant to strip governments of their traditional immunity from punitive damages. The members of the Congress that enacted Section 504 and Title II, no less than the members of the Congress that enacted Section 1983, were presumably "familiar with common-law principles, including defenses recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport*, 453 U.S. at 258; *see also Doe*, 242 F.3d at 456 ("When

Congress enacted Title II of the ADA and Section 504 of the Rehabilitation Act, it knew of the common law rule precluding punitive damages against municipalities."). Congress's failure to specifically expose units of government to punitive damages liability under these statutes can only be construed as an intentional decision to keep the traditional immunity intact.

2. The lower courts that have concluded otherwise have relied primarily on this Court's decision in *Franklin*. *See, e.g.*, Pet. App. 11a-16a; *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 829-32 (4th Cir. 1994) (state board of education could be sued for punitive damages under Section 504). Under *Franklin*, where Congress does not specify the remedies available to redress violations of federal statutory rights, the courts may fashion "appropriate" remedies, i.e., those remedies the courts had authority to award at common law in response to prohibited conduct. *See Franklin*, 503 U.S. at 66-68, 73-76. *Franklin* no doubt stands for the general proposition that, where Congress is silent on the matter of remedies in federal statutes, the courts are free to fashion appropriate relief in light of the traditional remedies available at common law. *Id.* at 66-68.

Franklin does not, however, suggest that governments' common law immunity from punitive damages is presumptively abrogated with respect to statutes like Section 504 and Title II. To the contrary, because a punitive award against a unit of government was not an "appropriate" remedy at common law, *see Newport*, 453 U.S. at 259-60, *Franklin* supports the view that punitive damages may *not* be awarded in cases against units of government brought under Section 504 and Title II. The holding in

Franklin simply re-affirmed a general remedies rule used since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), and does not supplant specific evidence of legislative intent rejecting punitive damages under Section 504 and Title II in general, and against government entities, in particular. *See Moreno v. Consol. Rail Corp.*, 99 F.3d 782, 791 (6th Cir. 1990) (*en banc*).

Indeed, if the court below and the Fourth Circuit in *Pandazides* have read *Franklin* correctly, then this Court's decision in *Newport* is effectively a dead letter. If the Eighth and Fourth Circuits are correct in their broad application of the general remedies rule used in *Franklin*, then *Franklin* compels the conclusion that governments may be held liable for punitive damages under Section 1983 and the FCA. This, of course, directly contradicts the holdings in *Newport* and *Vermont Agency of Natural Resources*.

Nothing in *Franklin* supports the extraordinary notion that the decision was intended as a *sub silentio* overruling of *Newport* or *Vermont Agency of Natural Resources*. Instead, the decisions may be construed together as providing that, regardless of whether punitive damages may be awarded against non-governmental defendants under statutes like Section 504 and Title II, the immunity from punitive damages that units of government enjoyed at common law persists with respect to statutory causes of action, absent a clear statement by Congress to the contrary. Because Section 504 and Title II lack that clear statement, the common law immunity should attach.

3. The structure of both the Rehabilitation Act and the ADA bolster the view that governments retain their immunity from punitive damages in actions brought pursuant to Section 504 and Title II. Through the Civil Rights Act of 1991, Congress specifically provided for the award of punitive damages for violations of Section 501 of the Rehabilitation Act and Title I of the ADA. The statute provides, in relevant part,

> A complaining party may recover punitive damages under this section against a respondent (*other than a government, government agency or political subdivision*) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis added). Significantly, this statute does not apply to actions brought under Section 504 and Title II. *See* Pet. App. 15a. "The very structure of § 1981a suggests a congressional intent to authorize punitive awards *in only a subset of cases* involving intentional discrimination." *Kolstad v. Am. Dental Assoc.*, 527 U.S. 526, 534 (1999) (emphasis added). In *Kolstad*, the Court recognized that Section 1981a was not an isolated amendment, but was carefully tailored for certain violations, *id.* at 530, 534, 537, that do not include violations of Section 504 or Title II. *See also Harrelson v. Elmore County*, 859 F. Supp. 1465, 1469 (M.D. Ala. 1994) ("Congress' express provision of punitive damages under Title I . . . counsels against a statutory construction that punitive damages are available under Title II by inference.").

Section 1981a(b)(1) goes a long way in reaffirming the view that governments enjoy immunity from punitive damages under Section 504 and Title II. This is so for two reasons. First, "[i]t is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan*, 121 S.Ct. at 2125 (brackets and quotation omitted); *see also Russello v. United States*, 464 U.S. 16, 22-23 (1983). By specifically authorizing punitive awards only under Section 501 of the Rehabilitation Act and Title I of the ADA, Congress presumably intended to foreclose such awards in actions brought under Section 504 and Title II. Indeed, prior to the enactment of the Civil Rights Act of 1991, the weight of authority had held that punitive awards were not available under either Title VI or Section 504. *See Moreno*, 99 F.3d at 789-90 ("punitive damages had never been awarded under § 504 and were widely believed to be unavailable.").[2] Given this prior judicial construction,

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[2] *See Eastman v. Va. Polytechnic Inst.*, 939 F.2d 204, 209 (4th Cir. 1991) (punitive damages not recoverable under Section 504); *Cortes v. Bd. of Governors*, 766 F. Supp. 623, 626 (N.D. Ill. 1991) (same); *Ams. Disabled for Accessible Pub. Transp. v. Skywest Airlines, Inc.*, 762 F. Supp. 320, 325 (D. Utah 1990) (same); *Glanz v. Vernick*, 750 F. Supp. 39, 45 (D. Mass. 1990) (same); *Martin v. Cardinal Glennon Mem. Hosp. for Children*, 599 F. Supp. 284 (E.D. Mo. 1984) (same); *Gelman v. Dep't of Educ.*, 544 F. Supp. 651, 654 (D. Colo. 1982) (same). *But see Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1138 (D.C. Iowa 1984) (punitive damages available under Section 504).

As the court in *Moreno* recognized, punitive damages likewise were not available under Title VI of the Civil Rights Act

Congress certainly would have included Section 504 and Title II within the ambit of the Civil Rights Act of 1991 had it wanted punitive damages awards to be made available under those provisions. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt ~~that in~~terpretation when it re-enacts a statute without change[.]").

Second, even as applied to Section 501 of the Rehabilitation Act and Title I of the ADA, Section 1981a(b)(1) expressly exempts units of government from punitive awards. This plainly shows that, where Congress contemplates the use of punitive damages to redress violations of civil rights statutes, it does not intend to authorize that remedy against units of government. And it is difficult to see why Congress would have intended to subject units of government to punitive awards for violating an anti-discrimination statute involving public services (Title II) but not a statute proscribing invidious employment discrimination (Title I). Therefore, Section 1981a(b)(1) provides strong evidence that Congress did not intend to expose governments to punitive damage awards in actions brought under Section 504 and Title II.

4. A further indication that Congress did not intend for punitive damages to be awarded against units of government under Section 504 and Title II is that Congress has already provided for an express, administrative sanction. This, coupled with the availability of other

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of 1964, on which Section 504 remedies are based. *See Moreno*, 99 F.3d at 790 (discussing and collecting cases that so held).

monetary remedies, renders punitive damages unnecessary.

A State's or municipality's federal funding under Section 504 may be withdrawn if there is "reasonable cause" to believe that the unit of government has violated Section 504. *See* 49 C.F.R. § 27.125 (2001). The cutoff of federal funds is a remedy more "drastic" than any award of damages. *Guardians Ass'n*, 463 U.S. at 601. It is an express sanction that makes an implied sanction unnecessary for purposes of deterrence. It is equally unnecessary for purposes of compensation, because this Court has already implied compensatory damages.

Under Section 504 and Title II, other monetary damages may be available to remedy a violation of those provisions.[3] *Doe*, 242 F.3d at 456. The availability of such monetary damages, questionable though they are against a sovereign State, draws into question the Eighth and Fourth Circuit's application of *Franklin* to a municipality. The rule in *Franklin* is designed to provide *"necessary"* remedial relief for a federal cause of action. *Bell v. Hood*, 327 U.S. 678, 684 (1946) (emphasis added) (citing *Marbury v. Madison*, 5 U.S. at 163 (" '[E]very right, when withheld, must have a remedy, and every injury its proper re-

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[3] As previously noted, *supra* at p. 1, some lower federal courts have held that Congress effectively abrogated States' sovereign immunity under Section 504 and Title II. In regards to the municipality in this case, which the Eighth Circuit held does not have Eleventh Amendment immunity, Pet. App. 8a, the Eighth Circuit erred by allowing punitive damages where compensatory damages had already "made whole" the plaintiff.

dress.' ")). Punitive damages are not "necessary" remedial relief. "[T]hey are *private fines levied by civil juries to punish reprehensible conduct* and to deter its future occurrence." *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (quotation omitted) (emphasis added). They are an "extraordinary sanction," *id.*, that courts should not lightly imply to abrogate units of government's traditional immunity.

Congress's express approval of an administrative sanction that "punishes" a unit of government, coupled with the Court's implied, compensatory remedy, shows that Congress did not intend to abrogate government's common law immunity by imposing on them additional, punitive damages.

CONCLUSION

For the reasons stated, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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